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in the

Supreme Court

of the

United States

NO. 79-1033

WEBB'S FABULOUS PHARMACIES, INC.,
and ECKERD'S OF COLLEGE PARK, INC., et al
Appellants,

vs.

ARTHUR H. BECKWITH, JR.,
CLERK OF THE CIRCUIT COURT,
and SEMINOLE COUNTY, FLORIDA,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

INTRODUCTION

Appellees in the above-entitled case move to dismiss or affirm on the grounds that the appeal does not present a substantial federal question and the federal question sought to be reviewed was not timely or properly raised or expressly passed on by the Florida Supreme Court. Rule 16 (1)(b), (c) and (d).

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of Section 28.33, Florida Statutes (enacted by Chapter 73-282, Laws of Florida), which provides in pertinent part as follows:

> "The clerk of the circuit court in each county shall make an estimate of his projected financial needs for the county and shall invest any funds in designated depository banks in interest-bearing certificates or in direct obligations of the United States in compliance with federal laws relating to receipt of and withdrawal of deposits . . . *Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines . . . . All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys* and shall be deposited in the same accounts as are other fees and commissions of the clerk's office. . . ." (Emphasis supplied.)

B. The Proceedings Below

Eckerd's of College Park, Inc., (Eckerd's) entered into an agreement to purchase the assets of Webb's Fabulous Pharmacies, Inc. (Webb's). Pursuant to Sec-

tion 676.106(4), Florida Statutes, Eckerd's then filed a complaint in interpleader in the Circuit Court (trial court) below, interpleading Webb's and Webb's creditors, and tendered the purchase price into the Circuit Court registry. Subsequently, on its own motion, the Circuit Court appointed a Receiver to determine the number and amount of claims filed against the monies in interpleader and to investigate the establishment of an account or accounts in which to deposit the monies.

The Circuit Court, on Eckerd's motion, then ordered that the purchase price be paid to the Clerk of the Circuit Court to be deposited in an interest-bearing account and reserved ruling on whether the interest earned would accrue to the benefit of the Clerk's office. The purchase price was accordingly delivered to the Clerk, who in turn deposited the monies in interest-bearing accounts.

Thereafter, on the Receiver's motion, the Circuit Court ordered that the monies in interpleader be delivered by the Clerk of the Circuit Court from the registry to the Receiver and directed the Clerk to continue to hold the accrued interest from the monies in the registry until a determination of the rightful party to receive the interest could be made. The Clerk paid the monies to the Receiver.

The Receiver then filed a motion to direct the Clerk of the Circuit Court to pay to the Receiver the interest accrued on the monies in interpleader while deposited in the Circuit Court registry. In response to this motion, the Circuit Court ultimately ordered the Clerk to pay the interest to the Receiver and held Section 28.33, Florida Statutes, to be unconstitutional "to the extent

that the provisions thereof pertain to private monies held in the registry of the court. . . ."

The Clerk of the Circuit Court and Seminole County, Florida, appealed the Circuit Court's order to the Florida Supreme Court, which reversed and held Section 28.33, Florida Statutes, to be constitutional. *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So.2d 951 (1979). It is from the decision of the Florida Supreme Court that the Appellants have taken this appeal.

II.

ARGUMENT

A. The Question Presented Is So Unsubstantial As Not To Warrant Further Argument

Appellants in their Jurisdictional Statement argue in part that the application of Section 28.33, Florida Statutes, to the facts of this case results in a taking of property without just compensation in violation of the Fifth and Fourteenth (Due Process Clause) Amendments of the United States Constitution. In support of this argument, Appellants cite judicial decisions from other jurisdictions in which particular statutes were construed and applied to various fact situations.

In response, it is fundamental that, where the validity of a state statute has been sustained in the face of federal objections, this Court on appeal must accept the state court's construction of the statute and proceed to test its validity on that basis. *Hortonville J.S.D. No. 1 v. Hortonville Ed.*, 426 U.S. 482 (1976); *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684 (1959). In this case, the Florida Supreme Court construed Section 28.33, Florida Statutes, to be applicable to interpleader monies deposited in the registry of the Circuit Court, such monies being considered "public money" while so deposited. See *Money v. State ex rel. Florida First National Bank*, 206 So.2d 436 (Fla. 1968); Section 219.01(2), Florida Statutes.

The Florida Supreme Court also found that, in the absence of the investment requirement of Section 28.33,

Florida Statutes, interest would not necessarily accrue on such interpleader monies, there being no common law right to interest on disputed funds deposited in court pending the outcome of litigation as to their ownership. See *Phillips Petroleum Co. v. Adams,* 513 F.2d 355 (5th Cir.), *cert. denied,* 423 U.S. 930 (1975); *Monarch Tile Sales v. Frost National Bank of San Antonio,* 496 S.W.2d 254 (Tex.Ct.App., 1973); 47 C.J.S. *Interest* §54 (1946); and Annot., 15 A.L.R.2d 473 (1951). As stated by the Florida Supreme Court, Section 28.33 "takes only what it creates." 374 So.2d at 953.

In contrast, the cases relied on by Appellants in their Jurisdictional Statement primarily concern situations in which there was either (1) a legislative direction or impediment which required payment of interest earned on monies held by a public officer to a designated recipient other than the public officer or general fund, but not necessarily to the person entitled to the principal; or (2) an absence of statutory direction as to the disposition of such interest, in which event the interest naturally flowed with the principal.

An example of the first category is *Metropolitan Water Dist. v. Adams,* 32 Cal.2d 620, 197 P.2d 543 (1948), in which the California Supreme Court construed the applicable statute to require that interest earned on funds deposited by a public agency in condemnation proceedings be paid to that public agency, and not to the general fund or to the condemnee ultimately receiving the funds. See also *Ostly v. Saper,* 147 Cal.App.2d 671, 305 P.2d 946 (1957); *Board of Law Library Trustees v. Lowery,* 67 Cal.App.2d 480, 154 P.2d 719 (1945); *Ponoma City School District v. Payne,* 9 Cal.App.2d 510, 50 P.2d 822 (1935); and *Lawson v.*

Baker, 220 S.W. 260 (Tex.Ct.App. 1920). Even the Texas Supreme Court's decision in *Sellers v. Harris County,* 483 S.W.2d 242 (Tex. 1972), upon which Appellants greatly rely, was based on the applicable statute's designation of the monies involved as "trust funds," thereby precluding their treatment as "county funds."

An example of the second category is *Bordy v. Smith,* 150 Neb. 272, 34 N.W.2d 331 (1948), in which the Nebraska Supreme Court found no statute directing the disposition of interest earned on tax foreclosure bids while deposited with the district court clerk. Thus, consistent with the general rule that where there is no statute to the contrary, interest becomes a part of the fund by whose investment it was produced, the Court held that the interest should go to the persons who deposited the bids. See also *Kiernan v. Cleland,* 47 Ida. 200, 273 P. 938 (1929); *Drainage Dist. No. 2 v. Ada County,* 38 Ida. 778, 226 P. 290 (1924); *University of South Carolina v. Elliott,* 248 So.C. 218, 149 S.E.2d 433 (1966); and *State v. McFetridge,* 84 Wis. 473, 54 N.W. 1 (1893).

Also included in the second category is the decision of this Court in *United States v. MacMillan,* 253 U.S. 195 (1920), referred to in the Appellants' Jurisdictional Statement. There, this Court cited its previous decision in *United States v. Mason,* 218 U.S. 517 (1910), to the effect that fees and emoluments received by a federal district court clerk were not within the purview of general federal statutes governing the handling of public monies of the United States, but were "allowed him for his compensation and office expenses under the statutes defining his rights and duties." 253 U.S. at 204.

Accordingly, this Court held that interest earned on the clerk's fees and emoluments was not subject to those general statutes either. It was also noted that, under the applicable rules, a litigant could apply to a federal district court to direct the allowance of interest on money deposited with that court and "to provide for its payment by the clerk when the request is granted." 253 U.S. at 205.

As can be seen, therefore, the Appellants' reliance on this Court's decision in *MacMillan* and the other decisions cited in their Jurisdictional Statement is misplaced. Those decisions concerned primarily the proper meaning and application of the particular statutes there involved. The results of the cases varied depending on the judicial construction given those statutes. However, in most cases in which an applicable legislative scheme for the investment of monies being held by a public officer and the disposition of the interest earned on them was found to exist, the court gave effect to that scheme, even if the required disposition of the interest was to someone other than the recipient of the principal. See, e.g., *Metropolitan Water Dist. v. Adams, supra.*

Such judicial implementation of the applicable legislative scheme, in apparent recognition of the fact that the interest in issue existed only because of that scheme, has also prevailed where, as here, the required disposition of the interest was to the office of the public officer involved or the general fund. Thus, for example, in *Locasio v. Rosewell,* 50 Ill.App.3d 794, 365 N.E.2d 949 (1977), the plaintiffs-condemnees sought the interest earned on funds deposited by the condemning authorities with the county treasurer during

condemnation proceedings. The plaintiffs claimed that the interest should have been allocated in the same manner as the principal and that a contrary result would constitute a taking of their property in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

In its decision, the court in *Locasio* first recited the general rule that interest is a creature of statute and is recoverable only by statute or contract. 365 N.E.2d at 951. The court also determined that there was no fiduciary relationship between the plaintiffs and the county treasurer. 365 N.E.2d at 952; compare *Sellers v. Harris County, supra.* Finally, the court held that the interest in issue came within the purview of the statutory requirement that all earnings accruing on any investments by the county treasurer of county monies must be credited and paid into the county treasury. This Court's decision in *MacMillan* was distinguished on the ground that it was based on a construction of "Federal statutes and rules, not on the legal or equitable principals concerning accountability for interest." 365 N.E.2d at 953. See also *Gonzalez v. Danaher,* 30 Ill.App.3d 992, 332 N.E.2d 603 (1975); and *In re Deposit Of Public Moneys,* 52 D. & C. 646, 93 P.L.J. 147 (Pa.Com.Pl. 1945).

Likewise, in this case, the Florida Supreme Court construed Section 28.33, Florida Statutes, and gave effect to the legislative scheme established by that statute for the disposition of interest earned pursuant to its provisions. In this respect, therefore, the Florida Supreme Court's decision here is not inconsistent with the bulk of the judicial decisions cited above. They too recognized that a legislature may rightfully provide for

the disposition of property legislatively created. The fact that the disposition required by Section 28.33 differs from the disposition contemplated by the statutes involved in certain of those decisions does not raise this case to a federal constitutional level or warrant this Court's plenary consideration.

B. The Question Presented Was Not Timely Or Properly Raised Or Expressly Passed On By The Florida Supreme Court

It has been stated often that this Court will not review a federal question unless the question has been properly presented to the state court below. See, e.g., *Street v. New York,* 394 U.S. 576 (1969); *Cardinale v. Louisiana,* 394 U.S. 437 (1969); and *Shelley v. Kraemer,* 334 U.S. 1 (1948). Mere reference to the "Constitution of the United States" or the "Constitution and laws of the United States" is insufficient. See *Herndon v. Georgia,* 295 U.S. 441, 442-443 (1935); *F. G. Oxley Stave Co. v. Butler County,* 166 U.S. 648 (1897). As stated in *New York Central & H. R. Co. v. New York,* 186 U.S. 269, 273 (1902), "it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth."

In this case, Appellants did not specifically raise in the state courts below the question as to whether Section 28.33, Florida Statutes, violates Article IV, Section 4 of the United States Constitution. In fact, an examination of the record should reveal that the Appellants never expressly relied on Article IV, Section 4 or that provision's guarantee of a "republican form of government." Moreover, a review of the Florida

Supreme Court's decision below reveals no reference to such a federal claim. See *Street v. New York, supra* at 582, in which it was stated that when the highest state court has failed to pass upon a federal question, "it will be assumed that the omission was due to want of proper presentation." Thus, this Court should not now review the validity of Section 28.33 on the ground that it violates Article IV, Section 4.

However, even assuming that Appellants have properly reserved this federal question, it cannot be seriously maintained that Section 28.33, Florida Statutes, has "destroyed" the judicial branch of the Florida government or "materially curtailed" its power and authority in violation of Article IV, Section 4 of the United States Constitution. See *Vansickle v. Shanahan,* 212 Kan. 426, 511 P.2d 223, 243 (1973); and *State v. Lehtola,* 55 Wis.2d 494, 198 N.W.2d 354 (1972). According to the Florida Supreme Court, even the minimal limitation on judicial options that Section 28.33 may pose with respect to the method of handling disputed funds apparently can be judicially overridden. As stated in the opinion below in response to one of Appellants' contentions:

> "It is irrelevant that had these funds been initially held by a receiver, the interest earned would have accrued to the party receiving the principal. In that event, judicial discretion would have been exercised and the legislature, under our separation of powers doctrine, could not effect a change in the court's order. Art. II, §3, Fla. Const. The legislature has the right, however, to decide that [interest on] funds held

by a public officer in a public account accrue to the benefit of all the people." 374 So.2d at 953.

Surely, this language demonstrates that the Florida Supreme Court has construed and applied Section 28.33, Florida Statutes, in a manner that protects the integrity of the state's judicial branch of government against any "curtailment" that Section 28.33 may arguably represent. Also, the fact that the Circuit Court below ultimately did grant the Appellants' motion to pay the interpleader monies involved to the Receiver, with the interest accruing thereafter to flow with the principal, proves that Section 28.33 does not constitute a legislative instrusion into the province of the judiciary. Had the Appellants made such motion initially, instead of moving to pay the interpleader monies into the Circuit Court registry, perhaps the interest in issue would not have been created and this case would have been unnecessary. Cf. *Adams, George, Lee, Schulte & Westinghouse,* 597 F.2d 570 (5th Cir. 1979), in which the unsuccessful claimants of a right to interest could have likewise acted on their own to protect that alleged right, but did not. In any event, however, the Appellants' argument on this point is totally without merit and warrants no further consideration by this Court.

III.

CONCLUSION

WHEREFORE, Appellees respectfully submit that the question upon which this cause depends is so unsubstantial as not to need further argument and that the question sought to be reviewed was not timely or properly reserved or expressly passed on by the Florida Supreme Court, and Appellees respectfully move this Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Florida Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of , 1980, copies of the foregoing Motion to Dismiss Or Affirm were furnished by mail to HARVEY M. ALPER, Massey, Alper, Wack & Eaton, 165 Whooping Loop, Altamonte Springs, Florida, 32701, Attorney for Appellants, and to all other persons required to be served in accordance with the Supreme Court Rules.

_____

HARRY A. STEWART